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Supreme Court, U.S.
FILED
APR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WADE POWELL and FREDA POWELL, his wife, and ERWIN WHITE and SUSAN WHITE, his wife,

Petitioners,

vs.

STATE OF FLORIDA, MUNROE REGIONAL CENTER, WILLIAM H. SHULTE, M.D., KEITH GAUGER, THOMAS M. TECHMAN, M.D., NORTH FLORIDA LIONS EYE BANK, INC., THE MEDICAL EYE BANK, INC., FLORIDA LIONS EYE BANK, INC., FLORIDA SOCIETY OF OPHTHALMOLOGY, INC., METROPOLITAN DADE COUNTY and the FLORIDA MEDICAL ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

Does the constitutionality of the State of Florida's Restoration of Sight Act which indisputedly serves the legitimate public purpose of restoring vision to Florida's sightless citizens merit review in the absence of any showing of infringement on fundamental federal rights?

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STATEMENT OF THE CASE

The Material Facts

There are a number of significant undisputed, material facts that have been omitted from the Petitioners' statement. The State of Florida therefore directs the Court's attention to the following facts of record, most of which are recited in the opinion of the Florida Supreme Court. See, State of Florida, et al., v. Wade Powell, et al., 497 So.2d 1188 (Fla. 1986); Pet. App. 13-18.

1. The State of Florida spends approximately $138,000,000 each year to provide its blind citizens with the basic necessities of life. At present, approximately ten percent of Florida's blind citizens are candidates for a cornea transplant, the highly effective procedure for restoring sight to the functionally blind (Pet. App. 13).

2. Cornea transplants are expected to increase in the State of Florida due to the increasing number of elderly persons locating in Florida, as corneal blindness is often age related. (Pet. App. 14).

3. Advances in the field of cornea transplants have expanded the use of this procedure to newborns, who without the Restoration of Sight Act would remain blind forever. If a newborn's corneas are not clear and a transplant is required, it must occur in the first few months of life. Otherwise, the brain loses its ability to "learn to see." (Pet. App. 14).

4. The key to successful corneal transplants is the availability of high quality corneal tissue; corneal tissue removed more than ten hours after death is generally unsuitable for transplantation. (Pet. App. 15).

5. The enactment of the Restoration of Sight Act, Section 732.9185, Florida Statutes, in 1977 has indisputably resulted in the increase of both the supply and quality of transplantable cornea tissue. In 1976, only 500 corneas were obtained for transplantation in the State of Florida, in stark contrast to the more than 3,000 Florida citizens who in 1985 had their sight restored through corneal transplant surgery. (Pet. App. 15).

6. The quality of corneal tissue obtained by outright donation and the tissue obtained pursuant to Florida's Restoration of Sight Act differs markedly. The tissue donated by individuals is largely unusable because of the advanced age of the donor at death. However, approximately eighty to eighty-five percent of the tissue obtained through medical examiners is suitable for transplantation. (Pet. App. 15, 16).

7. The reason for this increase in the quantity and quality of available corneal tissue was brought about by passage of Florida's Restoration of Sight Act. This is, in large part, attributable to the fact that Section 732.9185, Florida Statutes, does not impose a duty upon medical examiners to seek out the next of kin to obtain consent for the corneal removal. An affidavit in the record establishes that when California had a law imposing a consent requirement, the majority of families asked responded positively; however, approximately eighty percent of the families could not be located in sufficient time to remove usable corneal tissue. (Pet. App. 16).

8. Florida law permits removal of corneal tissue only when an autopsy is legally required. An autopsy necessarily results in a massive intrusion into the

decedent. Cornea removal, by comparison, requires an infinitesimally small -- only about .5 mm in thickness -- intrusion. The result does not affect the decedent's appearance. With or without cornea removal, the eyes must be "capped" to maintain a normal appearance. (Pet. App. 17).

9. Under Florida law, medical examiners may not automatically remove corneal tissue from all decedents subject to autopsy. The Restoration of Sight Act requires a request be made by an eye bank based on a present need for the corneal tissue. (Pet. App. 18).

SUMMARY OF ARGUMENT

Under Rule 17, Supreme Court Rules, the only arguable basis for the Court considering this case would be if it presented an important question of federal law which the Court had not settled. However,

Petitioners' present no important question of federal or constitutional law; the "right" they seek to assert is not fundamental. Despite Petitioners' arguments about the intimacy of family bonds and historical and traditional societal interests in "rituals and practices, religious and otherwise," the removal of corneal tissue, pursuant to the Act, violates no right or interest ever recognized under common law, much less a fundamental constitutional right.

Petitioners impart a false significance to their claim by referring to what they contend will be an increasing demand for "body parts from the dead" as medical technology advances. The statute at issue does not authorize removal for transplantation of anything other than corneal tissue. That, as the Florida Supreme Court observed, involves a minimal, even

negligible, intrusion into the body, occurring only when there is the already required massive intrusion of an autopsy.

The Florida Supreme Court correctly decided that no fundamental right or interest is violated by the Restoration of Sight Act and that Petitioners were not entitled to notice in the absence of any such recognized right or interest.

ARGUMENT

Respondent, State of Florida, (hereinafter Respondent, Florida) contends that under contemporary Florida law, Petitioners have no cognizable property interest in the remains of their decedents such as would entitle them to constitutional protection. Property interests are not created by the Constitution, but rather are "created and their dimensions are defined by existing rules or understandings that

stem from an independent source such as state law...." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Respondent Florida recognizes and concedes that Petitioners have a "right" under Florida law to dispose of their decedent as they deem appropriate. However, this "right" is limited to "possession of the body for the purpose of burial, sepulture or other lawful disposition...." Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950). The Fourth District Court of Appeal of Florida recognized the survivor's "right" in the remains of his decedent as based upon "the personal right of the decedent's next-of-kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th DCA 1969), aff'd, 238 So.2d 86, 89 (Fla. 1970) (emphasis added). Florida law, therefore, recognizes that survivors have a

"right" to lawfully dispose of their decedent, but this right is in the nature of tort rather than a property interest protected under the Constitution.

It is fundamental that in order to be entitled to constitutional protection, a person must demonstrate a legally cognizable interest in the matter to be protected. Under Florida law, Petitioners' right to dispose of their decedents as they deem appropriate, is simply not of a constitutional magnitude.

Equally clear is that a decedent has no constitutional interest in his own remains. Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1983); Roe v. Wade, 410 U.S. 113 (1973); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

Based on the foregoing, Respondent, Florida, submits that Petitioners have no

cognizable property interest in the remains of their decedents, either individually or as representatives of the decedents' estates, such as would entitle them to constitutional protection.

The legitimate governmental and public interests served by the Restoration of Sight Act are among the most compelling imaginable, and the means which the Legislature of Florida has chosen to accomplish this goal are among the most effective and least intrusive. Corneal tissue obtained through the operation of the Restoration of Sight Act accounts for approximately 90% of the tissue used for corneal transplants in Florida (R.572). This result is due in great part to the fact that affirmative consent by the next-of-kin is not required, and hence, much otherwise usable tissue is not lost through delay and/or the inability to contact next-of-kin. (Pet. App. 16).

The major critical factor in corneal transplants is the passage of time. (Pet. App. 14, 15).

The transplant of corneas differs in several important respects from the transplant of vital organs. Cornea transplants are simpler than transplants of vital organs. No matching of tissue is required, as with vital organs. In fact, almost every decedent is a potential suitable donor. Removal of corneal tissue does not affect a decedent's appearance as natural changes which occur after death require placement of eye-caps over the surface of each eye, regardless of whether corneal tissue has been removed.

The Restoration of Sight Act actually achieves its intended purpose of reducing blindness and its socio-economic impact on citizens of the State of Florida. More high quality corneal tissue is available

for use, decreasing patient waiting time for, and increasing the success rate of, corneal transplant surgery. Since it is only for the blind and vision-impaired that cornea transplants are needed, the Act's effect on correcting blindness, by increasing the supply of usable corneal tissue for transplant is unmistakable.

Petitioners have demanded to be compensated for the value of the corneal tissue removed (Pet. Brief 9). There is no fair market value for corneal tissue, however, because Section 873.01, Florida Statutes, prohibits the sale of anatomical matter. Moreover, even if it did not, there does not seem to be any reasonable basis for calculating the fair market value of corneal tissue. To the blind recipient, it is no doubt invaluable. At the same time, the eye banks, as not-for-profit distributors, charge less than their operating

expenses and in some circumstances provide the corneal tissue totally free of charge. (R.571-574).

Florida's Restoration of Sight Act contains many safeguards designed to limit cornea removal to instances in which the public's interest is greatest and the impact on the next-of-kin least. Corneas may only be removed (1) if the deceased is under the jurisdiction of the medical examiner, and (2) an autopsy is mandated by Florida law, and (3) removal will not interfere with the autopsy or an investigation of the death, and (4) a request must be made by an eye bank based on a present need, and (5) if no objection to the removal is known to the medical examiner. (Pet. App. 17,18). An autopsy is a surgical dissection of the body: it necessarily results in a massive intrusion into the decedent. However, autopsy

statutes, many of which authorize the procedure even in the face of known objections by the next-of-kin, have been upheld again and again as, in fact, the Florida autopsy statute was so upheld in the instant case. (Pet. App. 75). By comparison, cornea removal requires an infinitesimally small intrusion which does not visably affect the decedent's appearance. (Pet. App. 17).

Unquestionably, under the autopsy statute, the medical examiner has broad discretionary authority to order an autopsy. Beyond the natural changes that death brings to the condition of the body, the autopsy procedure alters it substantially more. It is only under these same circumstances, of massive intrusion, that the Legislature has by the Restoration of Sight Act authorized the slight further change of removing, absent objection,

small, thin, clear corneal tissue for transplant. Through this procedure the Legislature has sought and achieved the worthy public goal of bestowing sight to its blind citizens, unquestionably furthering the public health and welfare.

The procedure established by the Restoration of Sight Act is a legislative choice, rationally related to achieving legitimate public purposes. Petitioners' views in opposition to the statute, rooted in their philosophical sentiments[1] are improperly voiced in court: they must be addressed to the elected representatives of society who passed the Act, and who enact

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[1]The Florida Supreme Court's decision notes that "the record contains no evidence that the appellees' ["Petitioners"] objections to the removal of corneal tissue for human transplants are based on any 'fundamental tenets of their religious beliefs.'" (Pet. App. 27).

laws both to benefit society and to reflect its prevailing views and wishes.

CONCLUSION

The record below establishes that the "rights" upon which Petitioners rely to invalidate Florida's Restoration of Sight Act are not rights of a constitutional magnitude.

To the extent that Petitioners possess a right of less than constitutional magnitude to possession of a deceased's body for lawful burial, the minimal intrusion authorized by the Restoration of Sight Act is far outweighed by the state interest in public health and welfare in restoring vision to Florida's sightless citizens which the Act is intended to, and does, promote. Therefore, Respondent, Florida, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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